

The parties stipulated that the Claimant suffered a 10% permanent partial impairment of function to the body as a whole based on Dr. Murati's opinion. The Claimant is not entitled to a work disability award as requested. He is not and never has been authorized to work in the United States. It has been held that a Claimant

who is not eligible to lawfully work in the United States is not eligible for a work disability award, but they are entitled to benefits based on their functional impairment. Therefore, the Claimant suffers a 10% permanent partial disability to the body as a whole for his work related injuries.

Claimant contends Judge Fuller erred. Claimant argues his permanent partial general disability comprises 42 percent, which represents a 15 percent wage loss and a 68 percent task loss. Claimant argues that he lost his job with respondent because of his permanent work restrictions rather than because of his status as an illegal alien. Claimant contends he is entitled to receive a work disability (a permanent partial general disability greater than the functional impairment), which should be based upon his actual wage loss and task loss as now he has obtained other employment that pays 15 percent less than his pre-injury average weekly wage.

On the other hand, respondent and its insurance carrier contend the Award should be affirmed. They argue that the employer would have provided claimant with accommodated work had he been eligible to work legally in the United States. They also argue that public policy prevents workers who cannot legally work in the United States from receiving workers compensation benefits for a work disability and, consequently, those workers' permanent partial general disability benefits are limited to their functional impairment rating.

The only issue before the Board on this appeal is the extent of claimant's disability.

#### **FINDINGS OF FACT**

After reviewing the entire record and after considering the parties' arguments, the Board finds:

The parties agree that on January 14, 2002, claimant, Jose Luis Martinez, suffered injuries to his low back which resulted in a 10 percent whole body functional impairment rating. The parties also agree that claimant's accident arose out of and in the course of employment with Gilmore Roustabout Service, an oil field services company and the employer in this claim.

Immediately following the accident, claimant was taken to Stevens County Hospital. Later, claimant received treatment from the company doctor, Dr. Ian Yeats, who on March 18, 2002, released claimant to return to work without restrictions. Upon receiving that release, claimant returned to work for the employer performing his regular job duties. But claimant continued to experience low back symptoms and, therefore, he sought additional medical treatment.

Following an April 10, 2002 preliminary hearing, Judge Fuller authorized Dr. Pedro A. Murati to treat claimant. Claimant continued working for respondent through April 30, 2002, when Dr. Murati took claimant off work for tests and treatment.

Dr. Murati diagnosed “[l]ow back pain status post transverse process fracture at L3-4 with a right-sided radiculopathy and right SI joint dysfunction”<sup>1</sup> and treated claimant with medication and physical therapy. At their last visit, which was on July 30, 2002, the doctor released claimant to return to work with medical restrictions that conformed with a July 2002 functional capacity evaluation.

After receiving the medical release from Dr. Murati, claimant requested to return to work for the employer but the company declined. According to claimant, the company did not have a position that would accommodate his permanent work restrictions and limitations. But according to Scott Gilmore, the owner of the company, he did not permit claimant to return to work as his position had been filled. Mr. Gilmore testified, in part:

Q. (Mr. Brewer) And again, tell us the substance of that conversation at that time you had with Mr. Martinez in August after he had been gone for about three months?

A. (Mr. Gilmore) He came in that morning around 8:30, I had no one in my office, it was just me, and he asked me if he could come back to work. And I said . . . I told him that the position had been filled, that I didn’t have any work for him.<sup>2</sup>

The employer did not offer to return claimant back to work at any time before the February 14, 2003 regular hearing. Moreover, at that regular hearing claimant testified he has lived in the United States for approximately 10 years but he is not a United States citizen and he does not have the authority to work legally in the United States. Consequently, the employer could not return claimant to work without breaking the law.

Claimant eventually found other work setting up mobile homes, which he did for about three weeks. On approximately December 12, 2002, claimant found a different job with another oil field service company. The job setting up mobile homes, which claimant quit as he had problems doing the work, paid approximately \$8 per hour and required claimant to work approximately 60 hours per week. The job with the oil field service company, which claimant was continuing to perform as of the February 2003 regular hearing, paid \$9.50 per hour and required him to work from 50 to 55 hours per week.

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<sup>1</sup> Murati Depo. at 6.

<sup>2</sup> Gilmore Depo. at 16.

CONCLUSIONS OF LAW

The issue squarely before the Board on this appeal is the effect of claimant's inability to work legally in the United States upon the permanent partial general disability formula set forth in K.S.A. 44-510e. That statute provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

The above statute must also be read in light of *Foulk*<sup>3</sup> and *Copeland*.<sup>4</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned whenever the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

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<sup>3</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>4</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>5</sup>

In theory, the formula for permanent partial general disability measures both the wage loss and task loss that a worker incurs due to a work injury. Under that formula, the availability of work in the open labor market has a significant effect on a worker's permanent partial general disability rating. That statutory scheme, however, presupposes that workers may legally work in the United States.

But injured employees who cannot legally work in the United States cannot legally return to work for their employers and, theoretically, do not have the ability to find other work in the open labor market. Consequently, in order for those injured employees to make a good faith effort to seek other employment they must further violate the law. Consequently, comparing pre- and post-injury earnings for an illegal worker fails to quantify the extent of wage loss caused by the injury at work.

A primary goal of the Workers Compensation Act is to return injured employees to work. Under K.S.A. 44-510e, the Act encourages employers to accept their injured employees back to work as the permanent partial general disability is limited to the whole body functional impairment rating when the employee returns to work earning at least 90 percent of the pre-injury wage. But when the employee cannot legally work in the United States, the employer cannot return the employee to work without violating the law.

The work disability formula is premised upon an open labor market and an illegal worker does not have access to that market. Accordingly, the Board concludes that an illegal worker's permanent partial general disability should be measured by the worker's whole body functional impairment rating.

As indicated above, the parties stipulated that claimant sustained a 10 percent whole body functional impairment due to the January 14, 2002 accident. Consequently, claimant is entitled to receive benefits for a 10 percent permanent partial general disability. The April 21, 2003 Award should be affirmed.

### **AWARD**

**WHEREFORE**, the Board affirms the April 21, 2003 Award.

**IT IS SO ORDERED.**

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<sup>5</sup> *Id.* at 320.

Dated this \_\_\_\_ day of October 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c:   Lawrence M. Gurney, Attorney for Claimant  
      Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier  
      Pamela J. Fuller, Administrative Law Judge  
      Paula S. Greathouse, Workers Compensation Director